unreported[1/]

CHURCH OF THE AMERICAN KNIGHTS OF THE KU KLUX KLAN, JEFFERY L. BERRY, REVEREND, JAMES W. SHEELEY, REVEREND, and JANE DOE AND RICHARD ROE, Jane Doe and Richard Roe being members of the American Knights,

Plaintiffs-Appellees,

-against-

BERNARD KERIK, Commissioner of the Police Department of the City of New York, and THE CITY OF NEW YORK,

Defendants-Appellants.

Docket No. 02-9418

May 20, 2004

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Church of the American Knights of the Ku Klux Klan, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

[1/] The caption in this case is exactly the same as those of the federal court cases set forth in this appendix. These captions differ from the caption of the Petition in two respects: Reverend James W. Sheeley is not a petitioner; and Raymond W. Kelly, the present Commissioner of the Police Department of the City of New York, has been substituted for Bernard Kerik, the former Commissioner.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

CHURCH OF the AMERICAN KNIGHTS OF THE KU KLUX KLAN, Reverend Jeffrey L. Berry, Reverend James W. Sheeley, and Jane Doe and Richard Roe, Jane Doe and Richard Roe being members of the American Knights,

Plaintiffs-Appellees,

v.

Bernard KERIK, Commissioner of the Police Department of the City of New York, and The City of New York,

Defendants-Appellants.

No. 02-9418

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

January 20, 2004

Ronald E. Sternberg (Leonard Koerner, Rachel Goldman, of counsel; Michael A. Cardozo, Corporation Counsel of the City of New York, on the brief), Office of the Corporation Counsel of the City of New York, New York, NY, for Appellants.

Beth Haroules (Arthur N. Eisenberg, Norman Siegel, of counsel), New York Civil Liberties Union Foundation, New York, NY, for Appellees.

Before: JACOBS, CABRANES, and SOTOMAYOR, Circuit Judges.[2]

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[2] Judge Fred I. Parker was an original member on the panel that heard oral argument on August 4, 2003. He died on August 12, 2003 without having

JOSÉ A. CABRANES, Circuit Judge.

Defendants, the City of New York and its Police Commissioner,[3] appeal from a grant of summary judgment to plaintiffs, the Church of the American Knights of the Ku Klux Klan, the Reverend Jeffrey L. Berry, the Reverend James W. Sheeley, and Jane Doe and Richard Roe (collectively, "American Knights") entered by the United States District Court for the Southern District of New York (Harold Baer, Jr., Judge), dated November 19, 2002. The District Court found New York's anti-mask statute, New York Penal Law § 240.35(4), invalid under the First Amendment. Church of the American Knights of the Ku Klux Klan v. Kerik, 232 F.Supp.2d 205, 220 (S.D.N.Y.2002). For the reasons stated below, we reverse.

Background

The American Knights claims to be an "unincorporated political membership association that advocates on behalf of the white race and the Christian faith." Id. at 208. The organization was founded in 1994 by plaintiff Jeffrey Berry, currently the group's Imperial Wizard or national leader. While not formally associated with other organizations bearing the name "Ku Klux Klan," or a facsimile thereof, the American Knights does "identify in part with the Ku Klux Klan which existed earlier in American history insofar as both groups believe in racial separation and in the importance of the Ten Commandments

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voted on the matter. In accordance with applicable rules and practices of this Court, the Clerk selected, by lot, Judge José A. Cabranes to replace Judge Parker as a member of the panel.

[3] Bernard Kerik was Police Commissioner at the time this lawsuit was commenced. Although the caption continues to bear his name and there has been no formal substitution of parties, the incumbent Commissioner is the effective defendant in this case.

and the virtues of religious belief."[4] The group "opposes

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[4] The first Ku Klux Klan was founded in Pulaski, Tennessee, in the winter of 1865 or spring of 1866 as a social club. See Wyn Craig Wade, The Fiery Cross: The Ku Klux Klan in America ("Wade") 33 (1987), David M. Chalmers, Hooded Americanism: The History of the Ku Klux Klan ("Chalmers") 8 (3d ed.1987); see also Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 1544-46, 155 L.Ed.2d 535 (2003) (discussing the origins of the Ku Klux Klan in upholding Virginia's statute banning cross burning with the intent to intimidate). Mask wearing was part of the Klan's activities from the start, and was first used to create a ghost-like appearance that facilitated Klan members in playing pranks. Wade 33-35.

By 1867, however, masked Klan members had assumed the practice of "night riding," making nocturnal visits to the dwellings of blacks in order to harass and intimidate. Id. at 36-37. Over the ensuing years, the Klan established dens throughout the South, reorganized, and mobilized as a vigilante army, directing its activities not only at blacks, but also at white teachers at black schools and other northern "carpetbaggers," and at southern whites who disagreed with the Klan. Id. at 37, 45-46; Black, 123 S.Ct. at 1544. The Klan's nighttime visitations brought with them beatings, rape, arson, and murder. Wade 46-47. In response, Congress in April 1871 passed the so-called "Ku Klux Klan Act," see "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes," 17 Stat. 13 (now codified at 42 U.S.C. § § 1983, 1985, and 1986), creating a civil rights cause of action in federal court, and authorizing the President to use the military and suspend the writ of habeas corpus to quell civil disturbances under certain circumstances. Black, 123 S.Ct. at 1544. Pursuant to the Ku Klux Klan Act, in October 1871 President Grant employed the U.S. Army's Seventh Cavalry and suspended habeas corpus in parts of South Carolina. Wade 100. By the end of 1871, the first Klan had largely dissolved. Id. at 102; Chalmers 2. The second Klan began in 1915, inspired by D.W. Griffith's movie The Birth of a Nation--in turn based on Thomas Dixon's 1905 book The Clansmen--which depicted mask-wearing Klan members protecting the South from blacks and Reconstruction. See generally Wade 119-20, 206; see also Steve Oney, And the Dead Shall Rise: The Murder of Mary Phagan and the Lynching of Leo Frank 605-07 (2003) (discussing the relationship between the founding of the second Ku Klux Klan and the infamous lynching of Leo Frank, a Brooklyn-raised Jew who had been convicted of murdering Mary Phagan, a worker at an Atlanta pencil factory in which Frank was superintendent). The second Klan declared its

integration, affirmative action, racial intermarriage, immigration and abortion." As plaintiff Berry stated in his deposition, members follow the "old tradition of the hood and robe," the garb traditionally associated with the Klan of the Reconstruction era and its early twentieth-century purported successor.

On September 24, 1999, the American Knights applied to the New York Police Department ("police department") for a parade permit and a sound device permit for an event to be held on Saturday, October 23, 1999, on the steps of the New York County Courthouse at 60 Centre Street. Id. at 207. After reviewing the application, the police department notified the American Knights on October 15, 1999 that its plan to wear masks would violate New York Penal Law § 240.35(4), New York's anti-mask law. Id. That statute provides, in pertinent part:

A person is guilty of loitering when he:

Being masked or in any manner disguised by unusual or

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adversaries to include (in addition to blacks) Jews and Catholics; and resumed intimidation, whippings, and murders. In the 1920s, the Klan had successes in electing public officials--including the governor and both U.S. Senators from Indiana--and organized a well-publicized March on Washington, D.C. in August 1925. Id. at 215, 249. Klan membership had begun to wane after 1924, however, and the Klan suffered a long decline before ultimately disbanding in 1944 to avoid income tax liability. Id. at 253, 275; Chalmers 424. The Klan was revived after the Second World War, but beginning in 1949 became badly splintered, and has persisted as a number of independent groups. Chalmers 6, 424.

Groups claiming a link to, or an affinity with, earlier Klan organizations have surfaced from time to time in different parts of the country, and have initiated or provoked constitutional litigation, including litigation in this Circuit, related to their intentions to demonstrate publicly. See, e.g., Wilkinson v. Forst, 639 F.Supp. 518 (D.Conn.1986), aff'd in part and rev'd in part, 832 F.2d 1330, 1342 (2d Cir.1987).

unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment ....

N.Y. Penal Law § 240.35(4) (McKinney 2000). The permit was therefore denied. Church of Am. Knights, 232 F.Supp.2d at 207.

On October 19, 1999, the American Knights sought a preliminary injunction to force the police department to allow its members to demonstrate while wearing masks. Id. at 208. On October 21, a hearing was held before an anomalous "panel" of the District Court, consisting of Judge Harold Baer, Jr. and Judge Alvin K. Hellerstein; the latter had been assigned a related case dealing with the logistics of the planned event. Id. at 207. Judge Baer issued a preliminary injunction that allowed the American Knights to conduct the event with masks. Id. at 208. The following day, a panel of this Court (Kearse, Miner and Cabranes, JJ.) stayed that part of the District Court's order permitting the use of masks. Safir v. Church of the American KKK, No. 99- 9242 (2d Cir. Oct. 22, 1999).[5] The American

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[5] Following extended oral argument on October 22, 1999, we ruled from the bench as follows:

With respect to the motion of Safir and the City of New York for a stay, we are mindful that this case raises difficult questions of law, and perhaps questions not as simple as sometimes portrayed. We are mindful of the finding of the District Court that the restrictions sought to be imposed by the city are not content based.

We conclude that that finding is not clearly erroneous or an abuse of the District Court's discretion. In light of that finding we conclude that this case is distinguishable from those cases in which this Court has protected the anonymity of organizations and individuals seeking to exercise First Amendment rights of association and speech. Accordingly, we have concluded that[,] in the circumstances here presented, a stay of the

Knights applied pursuant to 28 U.S.C. § 1651 to Justice Ginsburg, our Circuit Justice, to reinstate the preliminary injunction, and on October 23, 1999 she declined to do so. Church of Am. Knights, 232 F.Supp.2d at 208; see generally John Kifner, Unmasked Klan Is Besieged at Manhattan Rally, N.Y. Times, Oct. 24, 1999, at A1. Our stay effectively negated the District Court's order permitting the American Knights to demonstrate with masks.

The American Knights conducted its demonstration on October 23, 1999 as planned. Church of Am. Knights, 232 F.Supp.2d at 208. Seventeen members participated and wore the American Knights' regalia, including robes and hoods, but did not wear masks. Id. In proceedings before the District Court after the demonstration, both parties moved for summary judgment on the American Knights' request for declaratory relief and a permanent injunction. Id.

The District Court granted plaintiffs' motion for summary judgment, and denied defendants' motion for summary judgment, on four independent and alternative First Amendment grounds. See id. at 210-20.

First, the District Court held that the American Knights' mask wearing was protected by the right to anonymous speech. Id. at 210. The District Court relied primarily on three of this Court's

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judgment of the District Court, which judgment requires the issuance of a permit to the plaintiffs despite the plaintiffs' use of masks, is appropriate. The judgment of the District Court is stayed to the extent that it requires the city to issue a permit to the plaintiffs that allows the use of masks. It is so ordered.

Additionally, we denied the motion of a group of Klan opponents, the Partisan Defense Committee, for an injunction granting them a sound permit for a rally at the same site as the American Knights. See generally Benjamin Weiser, Appeals Court Bars Klan Masks; Group Still Plans to Stage Rally, N.Y. Times, Oct. 23, 1999, at A1.

decisions: NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), which held that the State of Alabama could not compel the National Association for the Advancement of Colored People to reveal to the State's Attorney General lists of its members' names and addresses; Buckley v. Valeo, 424 U.S. 1, 72-74, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), which upheld a federal statute requiring the disclosure of donors to political parties, but noted circumstances in which the statute might be unconstitutionally applied; and McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), which invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature. The District Court reasoned that, "[l]ike the NAACP members, the citizen distributing leaflets and the donors to political campaigns, the American Knights have produced unrefuted evidence that it has a legitimate fear of reprisal if its members reveal their identities at public American Knights' events." 232 F.Supp.2d at 213. The District Court rejected defendants' attempts to distinguish these precedents as involving "compelled disclosure" rather than "prevented concealment," and held that since the statute restricts protected speech, the inquiry is whether the statute is narrowly tailored to serve a compelling state interest. Id.

The District Court concluded that the statute did not pass the exacting scrutiny prescribed in the anonymous speech cases. Id. at 215. It agreed with defendants that the statute advanced security and law enforcement concerns: "The statute prevents groups of demonstrators from concealing their faces which understandably makes it more difficult for police officers to identify and apprehend wrongdoers." Id. at 214. However, the District Court held that the statute was not narrowly tailored to these concerns because it applied regardless of the demonstrators' propensity for illegal behavior. Id. The District Court determined that the government could have taken other, less restrictive means to address its goals; "[f]or example, the police department could ask permit applicants if participants

will wear masks and if so, require lead time to insure proper security measures are in place and assign additional officers to curtail any increased risk of disruption by demonstrators or, as happened here, counter-demonstrators." Id. at 215. The Court also questioned whether the defendants' asserted interest in law enforcement was a compelling one, in light of the statute's exception for entertainment events, where crime might just as easily occur. Id.

Second, the District Court found that wearing masks was protected as expressive conduct or symbolic speech. Id. at 216. The District Court determined, as an initial matter, that wearing the masks constituted expressive conduct, in that "[t]he hooded masks are an integral part of the message that links the American Knights to the KKK and its horrific ideology." Id. The District Court thereby rejected defendants' argument that the masks themselves, as distinct from the rest of the Klan regalia, did not convey a particularized message, explaining that " 'a narrow, succinctly articulable message is not a condition of constitutional protection ....' " Id. (quoting Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)). The District Court then determined that, since neither party argued that the statute was enacted with a motive to suppress or popularize any particular viewpoint, the applicable level of scrutiny was that set forth in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). See Church of Am. Knights, 232 F.Supp.2d at 217. Under O'Brien, a statute will be upheld if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest unrelated to the suppression of free expression; and if the incidental restriction on speech is no greater than is essential to the furtherance of that interest. See O'Brien, 391 U.S. at 377, 88 S.Ct. 1673. The District Court concluded, referring to its prior discussion of the right to anonymous speech, that the anti-mask statute was not narrowly tailored to serve an important or substantial government

interest. Church of Am. Knights, 232 F.Supp.2d at 217.

Third, the District Court held that the anti-mask statute was facially invalid, since it "distinguishes on its face between types of expression--it allows masks for entertainment events but for no others." Id. at 218. The District Court reasoned that the "result is that a face mask worn to delight the public is lawful while one intended to sway its political beliefs is unlawful." Id. The District Court concluded, "[a]s this statute is clearly founded on the content of the speech, it cannot be sustained as a time, place or manner restriction." Id. at 219.

Fourth and finally, the District Court held that the City "engaged in viewpoint discrimination by selectively applying the statute to the American Knights while not to other similarly situated groups." Id. The District Court seemed to undertake a "viewpoint discrimination" inquiry under the First Amendment, but in places characterized its analysis in terms of "selective enforcement," a phrase from Equal Protection jurisprudence. The District Court pointed to other high-profile, non-entertainment gatherings in which the police department did not arrest participants who covered their faces, and the District Court rejected defendants' argument that there was no viewpoint discrimination because, in those cases, the participants did not provide advance warning to the police department of their intent to wear masks. Id.

On appeal, defendants argue that (1) the masks worn by the American Knights do not possess sufficient communicative elements to implicate the First Amendment; (2) even if mask wearing constituted expressive conduct, the anti-mask statute is constitutionally valid as either a permissible restriction on symbolic expression or as a reasonable time, place or manner restriction; (3) the First Amendment does not extend to protect masked expression in a public forum; (4) even if the First Amendment did so extend, the statute is narrowly tailored to serve an overriding state interest, and is therefore

constitutionally valid; and (5) the American Knights was not the victim of unconstitutional viewpoint discrimination or selective enforcement.

Discussion

We review a district court's grant of summary judgment de novo, construing the record in the light most favorable to the nonmoving party. See, e.g., New York State Ass'n of Realtors, Inc. v. Shaffer, 27 F.3d 834, 838 (2d Cir.1994).

I. New York's Anti-Mask Law

New York's anti-mask law, reenacted in its current form in 1965, can be traced back in substance to legislation enacted in 1845 to thwart armed insurrections by Hudson Valley tenant farmers who used disguises to attack law enforcement officers. See Church of Am. Knights, 232 F.Supp.2d at 217 n. 10. The "Anti-Rent era" in New York history, running from 1839 to 1865, involved a conflict over lease terms between the landlords and tenants of vast manorial estates. See generally Charles W. McCurdy, The Anti-Rent Era in New York Law and Politics, 1839-1865 ("McCurdy") (2001); Reeve Huston, Land and Freedom: Rural Society, Popular Protest, and Party Politics in Antebellum New York ("Huston") (2000). The tenants held "leases in fee," an arrangement in which they paid the landlord rent, and rendered annual services, for an indefinite term. "Quarter sale" provisions in the leases commonly entitled landlords to one-fourth of the sale price if the tenants sold their farms. McCurdy 1. Depressions in the prices of wheat and loss of soil productivity left many tenants unable to fulfill their rental obligations, and ultimately indebted for back rent. Huston 47-49; McCurdy 12-13. After the death in 1839 of Stephen Van Rensselaer III, the "Good Patroon" of Rensselaerwyck,[6] the largest estate in New York, his son

[6] "Patroon," as readers familiar with the history of New York State will

Stephen Van Rensselaer IV demanded repayment of outstanding debts, and sought to evict tenants who did not pay. Huston 85-92; McCurdy 15-18. Their livelihood threatened, tenants organized anti-rent associations to muster funds for litigation and to exert pressure on legislators. Huston 97, 107-08. Some anti-renters formed bands of so-called "Indians," disguised in calico gowns and leather masks, who forcibly thwarted landlords' efforts to serve farmers with process or to conduct distress sales. Id. 116-19. The operations of the masked Indians commonly involved intimidation, and sometimes tarring and feathering, but also caused three deaths from 1844-45, including the death of a sheriff. Id. 120, 146-150.

In response to the civil unrest in upstate New York, the New York legislature passed on January 28, 1845 "An Act to prevent persons appearing disguised and armed." Laws of the State on New York, 68th sess., at 5-7 (C. Van Benthuysen & Co. 1845). It authorized the pursuit and arrest of any person who "having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent him from being identified, shall appear in any road or public highway, or in any field, lot, wood or enclosure." Id. at 5. The Act provided that such a person, upon being brought before a judge "and not giving a good account of himself, shall be deemed a vagrant," and could be imprisoned in the county jail for up to six months. Id. The Act imposed more severe penalties for those who appeared masked in groups: "Every assemblage in public houses, or other places, of three or more persons disguised as aforesaid, is hereby declared to be unlawful," punishable by up to a year's imprisonment. Id. at 6-7. Governor Silas Wright, in a message to the legislature on January 1845, urged the passage

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know, is a Dutch word referring to a landholder in the colony of New Netherland, granted proprietary rights to an estate or "patroonship" in exchange for bringing settlers to the colony. See, e.g., Edwin G. Burrows & Mike Wallace, Gotham: A History of New York City to 1898, at 28 (1999).

of an anti-mask law for the "prevention and punishment of crime." 4 Messages from the Governors 149 (Charles Z. Lincoln ed., J.B. Lyon Co.1909) (1845). Governor Wright explained:

[T]he disguises of ... organized bands, calling themselves Indians, are assumed [i.e., worn] for purposes unlawful and highly criminal .... After [an] offense, or other and higher crime has been perpetrated, the disguise is laid aside, and even eye witnesses upon the spot, may not be able to identify the guilty. Id. at 149-50. Governor Wright argued that an anti-mask law "would go far to aid in the prevention of the crimes which have been recently so daringly committed, under the protection of masks and other disguises." Id. at 150.

New York's anti-mask law was therefore indisputably aimed at deterring violence and facilitating the apprehension of wrongdoers; the parties agreed, and the District Court properly held, that the statute was not enacted to suppress any particular viewpoint.[7] Church of Am. Knights, 232 F.Supp.2d at 216-17. With the anti-mask law's history as a background, we now turn to the District Court's holding that the act violates the First Amendment rights of the American Knights.

II. Expressive Conduct

It is well established that "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 1547, 155 L.Ed.2d 535 (2003). As this Court has cautioned, however, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person

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[7] The District Court did hold, however, that the statute had been applied by defendants in such a way as to discriminate unconstitutionally against the American Knights' viewpoint. See Church of Am. Knights, 232 F.Supp.2d at 219.

engaging in the conduct intends thereby to express an idea." O'Brien, 391 U.S. at 376, 88 S.Ct. 1673; see also Zalewska v. County of Sullivan, 316 F.3d 314, 319 (2d Cir.2003) (quoting from the preceding passage in O'Brien). In determining whether particular conduct is sufficiently expressive to implicate the First Amendment, therefore, the test is whether " '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)). The party asserting that its conduct is expressive bears the burden of demonstrating that the First Amendment applies, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), and that party must advance more than a mere "plausible contention" that its conduct is expressive. Id.[8]

The District Court determined that "[t]he hooded masks are an integral part of the message that links the American Knights to

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[8] This Court's decision in Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), did not alter these standards. In Hurley, the Court, in finding the St. Patrick's Day Parade in Boston to be an "expressive parade," stated that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." Id. at 569, 115 S.Ct. 2338 (citation omitted). While we are mindful of Hurley 's caution against demanding a narrow and specific message before applying the First Amendment, we have interpreted Hurley to leave intact this Court's test for expressive conduct in Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). See Zalewska v. County of Sullivan, 316 F.3d 314, 319 (2d Cir.2003) ("To be sufficiently imbued with communicative elements, an activity need not necessarily embody 'a narrow, succinctly articulable message,' but the reviewing court must find, at the very least, an intent to convey a 'particularized message' along with a great likelihood that the message will be understood by those viewing it.") (citations omitted).

the KKK and its horrific ideology," and concluded that "clearly the masks constitute expressive conduct." Church of Am. Knights, 232 F.Supp.2d at 216. The message conveyed by the masks, according to the District Court, was that the Knights wish to identify with the historic Klan. The American Knights asserts that by wearing masks, its members "intend to convey to the public that [they] follow the ideological tradition of the Klan and share many of the views about racial separation and white pride with which the Klan has been identified."

We agree with the District Court that the regalia of the American Knights, including the robe, mask, and hood, are expressive; they are expressive in the way that wearing a uniform is expressive, identifying the wearer with other wearers of the same uniform, and with the ideology or purpose of the group. We do not doubt that a person who viewed a member of the American Knights wearing such regalia would likely grasp that association. New York's anti-mask statute does not, however, bar members of the American Knights from wearing a uniform expressive of their relationship to the Klan. The statute only proscribes mask wearing.

The mask that the members of the American Knights seek to wear in public demonstrations does not convey a message independently of the robe and hood. That is, since the robe and hood alone clearly serve to identify the American Knights with the Klan, we conclude that the mask does not communicate any message that the robe and the hood do not.[9] The expressive

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[9] We note that before the District Court, the Knights claimed that the masks conveyed--beyond the messages of tradition and identity with the Klan conveyed by the robe and hood--additional and independent messages, both secular and religious, including equality among the members and humility before God. See Church of Am. Knights, 232 F.Supp.2d at 208. The District Court did not address whether the Knights in fact intended to convey these messages, or whether such messages would likely be understood by onlookers.

force of the mask is, therefore, redundant.

Not only is the message conveyed by the mask duplicative of the robe and hood, we think the mask adds no expressive force to the message portrayed by the rest of the outfit. The mask's asserted message is already being conveyed unequivocally: Inasmuch as the robe and hood draw an association between the American Knights and the Klan that is clear and unmistakable to any viewer, the addition of the mask cannot make that association any clearer.[10] [FN8] A witness to a rally where demonstrators *207 were wearing the robes and hoods of the traditional Klan would not somehow be more likely to understand that association if the demonstrators were also wearing masks. The American Knights offers no evidence or argument to the contrary.

Additionally, the expressive quality of the mask, as part of the American Knights' regalia, is diminished by the fact that mask

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The Knights did not assert in their briefs or at oral argument that the masks convey these messages. The record before us demonstrates that some members of the Knights are not aware of these purported meanings of the masks. See, e.g., Appellants' Br. at 15 (quoting the testimony of a member of the American Knights that wearing the mask and hood "means that a person is a Klansmen," but beyond that, "[t]here's really no message"). This apparent confusion about the mask's message among Klan members is unlikely to be understood by non-Klan members viewing the masks. Indeed, we conclude that some of the assertions by individual American Knights that the masks convey an independent meaning--e.g., "[t]he hooded masks also convey a sense that everyone is equal, regardless of ... race," Church of Am. Knights, 232 F.Supp.2d at 208--are simply implausible, if not frivolous, and would certainly not be conveyed to a viewer. Accordingly, we agree with the defendants that the masks express nothing beyond the associational ties expressed by the robe and hood.

[10] The American Knights does not contend that the mask conveys, or is intended to convey, an independent "message" of intimidation, or that it adds an element of fear or intimidation to the message that the rest of Klan regalia conveys. To the extent that such a message of intimidation would be conveyed, it might constitute a "true threat," and would therefore not be protected by the First Amendment. See Black, 123 S.Ct. at 1548.

wearing appears to be, to some extent, optional among American Knights.[11] Plaintiffs Jeffrey Berry and James Sheeley, respectively the National Imperial Wizard and the Grand Dragon for the Realm of New York and New Jersey of the American Knights, attend rallies without wearing masks. One rank-and-file member testified that some attendees at rallies, including members who are not part of the hierarchy, do not wear masks. These are "people who are already public" and who do not need to wear masks to protect their identities. Plaintiff Berry testified that "[o]nly people who everybody knows who they are already" are permitted to attend rallies without masks. To the extent that mask wearing is not even a uniform practice, the masks scarcely contribute to the expressiveness of the American Knights' uniform.

The approach we take today, analyzing the expressive value of the mask apart from the robe and hood, is supported by our decision in Latino Officers Association, New York, Inc. v. City of New York, 196 F.3d 458 (2d Cir.1999). In that case, we held that the New York Police Department's parade policy likely ran afoul of the First Amendment by preventing the plaintiffs, the Latino Officers Association ("LOA"), from marching in parades while wearing their police uniforms to protest discrimination and misconduct within the police force. Id. at 469. The City of New York argued that the plaintiffs' interest in wearing police uniforms was not protected under the First Amendment at all, because members of the public were unlikely to understand the plaintiffs' message merely from the fact that they were wearing uniforms. Id. at 465. In rejecting the City's argument, we explained that "members of the public--specifically, the spectators at each of the parades--are more likely to discern and

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[11] At one point in Klan history, masks were not merely non-mandatory but were even prohibited. In 1939, Imperial Wizard James A. Colescott publicly condemned floggings and lynchings, and, in recognition of the connection between mask wearing and violence, forbade Klansmen from concealing their faces while wearing their robes. See Wade at 266.

understand the LOA's message about discrimination and misconduct in the NYPD if plaintiffs wear uniforms." Id. at 465-66 (emphasis added). If the LOA's wearing of uniforms had added nothing whatsoever to their message, we would not have found the same First Amendment concerns implicated. See id.; see also Hernandez v. Superintendent, 800 F.Supp. 1344, 1351 (E.D.Va.1992) ("[T]he mask contributes nothing to the message already conveyed by the remainder of the costume, nor does it convey any independent message. Thus, on the facts presented, petitioner's mask-wearing did not constitute expressive conduct entitled to First Amendment protection because it did not convey a particularized message."); Hernandez v. Commonwealth, 12 Va.App. 669, 673, 406 S.E.2d 398, 400 (1991) ("Without the mask, the social and political message conveyed by the uniform of the Ku Klux Klan is the same as it would be with the mask.").

We are mindful that a federal court's analysis of the expressive quality of conduct can be a difficult task. It is, however, a task that we must undertake. See, e.g., Zalewska, 316 F.3d at 320 ("Although appellant's activity is expressive, it does not constitute the type of expressive conduct which would allow her to invoke the First Amendment in challenging the county's regulation because the ordinary viewer would glean no particularized message from appellant's wearing of a skirt rather than pants as part of her uniform."). We hold merely that where, as here, a statute banning conduct imposes a burden on the wearing of an element of an expressive uniform, which element has no independent or incremental expressive value, the First Amendment is not implicated, and a balancing of interests under United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), is unnecessary.

III. Anonymous Speech

In numerous decisions, this Court has recognized a right to anonymous speech grounded in the First Amendment freedoms

of speech and association. In the seminal case, NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), the Court held that the State of Alabama could not compel the NAACP to reveal to the State's Attorney General lists of its members' names and addresses. The Court found that "compelled disclosure" of the NAACP's Alabama membership "is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." Id. at 462-63, 78 S.Ct. 1163. Because the disclosure order was a "substantial restraint" on the NAACP members' constitutionally protected right of association, the Court subjected the order to exacting scrutiny[12] and ultimately invalidated the order. Id. at 463-66, 78 S.Ct. 1163.

Subsequent decisions of this Court have applied NAACP v. Alabama to prevent compelled disclosure of names in other contexts. See generally McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (invalidating an Ohio statute that prohibited the distribution of anonymous campaign literature); Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) (invalidating a Los

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[12] The Court asked "whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association," NAACP, 357 U.S. at 462-63, 78 S.Ct. 1163, and noted that such a "subordinating interest of the State must be compelling," id. (quotation marks omitted). More recently, in a case likewise involving the right to anonymous speech, this Court has explained that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).

Angeles ordinance that prohibited the distribution of handbills without the names and addresses of persons who prepared, distributed, or sponsored the handbills); Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960) (upholding the NAACP's refusal to provide the names of its members to municipal tax officials); see also Buckley v. Valeo, 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."). Most recently, this Court addressed the issue of anonymous speech in Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), where it held that the First Amendment was violated by a Colorado statute that required persons who circulated petitions for an initiative to wear identification badges revealing their names. Id. at 200, 119 S.Ct. 636.

These Supreme Court decisions establish that the First Amendment is implicated by government efforts to compel disclosure of names in numerous speech-related settings, whether the names of an organization's members, the names of campaign contributors, the names of producers of political leaflets, or the names of persons who circulate petitions. In contrast, this Court has never held that freedom of association or the right to engage in anonymous speech entails a right to conceal one's appearance in a public demonstration. Nor has any Circuit found such a right. We decline the American Knights' request to extend the holdings of NAACP v. Alabama and its progeny and to hold that the concealment of one's face while demonstrating is constitutionally protected.

The District Court stated that, in determining whether the First Amendment applies, the question is "whether disclosing the identity of the American Knights' members restricts protected speech ...." Church of Am. Knights, 232 F.Supp.2d at 213. Assuming for the discussion that New York's anti-mask law

makes some members of the American Knights less willing to participate in rallies, we nonetheless reject the view that the First Amendment is implicated every time a law makes someone--including a member of a politically unpopular group--less willing to exercise his or her free speech rights. While the First Amendment protects the rights of citizens to express their viewpoints, however unpopular, it does not guarantee ideal conditions for doing so, since the individual's right to speech must always be balanced against the state's interest in safety, and its right to regulate conduct that it legitimately considers potentially dangerous. Because "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," a conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment. Arcara v. Cloud Books, Inc., 478 U.S. 697, 706, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986).

Because we hold that the plaintiffs' right to ānonymous speech is not implicated here, we find it unnecessary to consider whether the anti-mask statute passes the scrutiny applied under NAACP v. Alabama and its progeny.

IV. Facial Validity

This Court has stated that, "[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536-37, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (citation and quotation marks omitted). Applying this rule, the Court held that the New York Public Service Commission's decision to prohibit "utilities from using bill inserts to discuss political matters," id. at 532, 100 S.Ct. 2326, violated the First Amendment rights of the plaintiff utility company. Id. at 544, 100 S.Ct. 2326. Unlike the regulation at issue in Consolidated Edison, New York's anti-mask law regulates conduct-- the

wearing of masks in groups--rather than pure speech, and is not facially invalid for distinguishing between types of conduct.

Further, we have held above that the wearing of masks by members of the American Knights is not expressive conduct that implicates the First Amendment. The anti-mask law, far from restricting expression based on its message, is not restricting protected expression at all.

Because the anti-mask law regulates the conduct of mask wearing, and does so in a constitutionally legitimate manner, it can legitimately create an exception for mask wearing that "occurs in connection with a masquerade party or like entertainment." N.Y. Penal Law § 240.35(4). Just as it is not our place to second-guess the New York legislature's determination during the Anti-Rent era that mask wearing by groups poses a threat to the peace, undermining the efforts of law enforcement officers to identify wrongdoers and thus protect the public, so we will not second-guess the apparent legislative determination that mask wearing at entertainment events does not pose the same security risks as mask wearing in other circumstances. We hold that New York's anti-mask law is not facially unconstitutional.

V. Viewpoint Discrimination

The District Court seemingly held that defendants, in applying the anti-mask statute, engaged in "viewpoint discrimination" in violation of the First Amendment rights of the American Knights. Church of Am. Knights, 232 F.Supp.2d at 219-20. The District Court quoted this Court's statements in Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), that " 'viewpoint discrimination is ... an egregious form of content discrimination,' " and that " '[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for

the restriction.' " Church of Am. Knights, 232 F.Supp.2d at 219-20 (quoting Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510). The District Court also held, however, that the statute was not enacted to suppress any particular viewpoint. Id. at 216-17. Because we have held above that the anti-mask law as applied to the American Knights does not burden pure speech or expressive conduct, we see no basis for arguing that the statute burdens the "viewpoint" of the American Knights at all, much less does so in a discriminatory fashion.

Although it invoked "viewpoint discrimination" and Rosenberger, a First Amendment case, the District Court's opinion also referred to "selective enforcement," a phrase associated with analysis under the Equal Protection Clause. See Giordano v. City of New York, 274 F.3d 740, 750-51 (2d Cir.2001). A selective enforcement claim requires, as a threshold matter, a showing that the plaintiff was treated differently compared to others similarly situated. See id. The American Knights argues that the police department denied it a permit on the basis of the American Knights' viewpoint, and points to several instances in which participants in other events covered their faces with masks or the equivalent, and were not arrested. As examples, the American Knights cited:

Iranian students protesting the Shah in 1977, protestors rallying after the funeral of Amadou Diallo in 1999, protestors opposing the rally held by the plaintiff in this action on October 23, 1999 who wore rubber face masks satirizing Mayor Giuliani, and pro-Palestinian protestors who wore kefiyahs or head scarves on October 13, 2000 when they gathered at Times Square and again on October 20, 2000 when they assembled at the Israeli Consulate.

Church of Am. Knights, 232 F.Supp.2d at 219.

Defendants respond that there was no differential treatment--a prerequisite to selective enforcement--because in the situations

cited, the participants did not provide advance warning of their intent to wear masks. We agree. The American Knights applied to the New York Police Department for a permit, and specifically informed the police that they would be wearing masks in violation of New York Penal Law § 240.35(4). The police department refused the American Knights a permit. The American Knights has not suggested, much less shown, that any other group was granted a permit in such circumstances. Plaintiffs have therefore failed to establish a case of either viewpoint discrimination or selective enforcement.

Conclusion

For the reasons stated above, we hold that New York Penal Law § 240.35(4) is valid under the First Amendment. The judgment of the District Court is therefore reversed, and the cause remanded to the District Court with instructions to enter summary judgment in favor of defendants.

232 F.Supp.2d 205

CHURCH OF THE AMERICAN KNIGHTS OF THE KU KLUX KLAN, et al.,

Plaintiffs,

-against-

Bernard KERIK, et al.,

Defendants.

No. 99 Civ. 10635(HB).

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

November 19, 2002.

Norman Siegel, Arthur N. Eisenberg, Beth Haroules, New York Civil Liberties Union Foundation, New York City, for Plaintiffs.

Rachel Bess Goldman, Michael D. Hess, Corp. Counsel of City of New York, New York City, for Defendants.

OPINION & ORDER

BAER, District Judge:

Plaintiff Church of the American Knights of the Ku Klux Klan ("American Knights") brings this action for a declaratory judgment and a permanent injunction declaring New York Penal Law § 240.35(4), which prohibits the wearing of masks at public gatherings, unconstitutional under the First Amendment. In response, defendants Bernard Kerik, former

Commissioner of the New York City Police Department, and the City of New York contend that the Court should not grant the injunctive relief as the statute is constitutional as a legitimate exercise of state police power. This Court, sitting with Judge Hellerstein, who had been assigned a related matter dealing primarily with the logistics of the proposed event, granted plaintiff's request for a preliminary injunction on October 21, 1999. The Second Circuit stayed that aspect of the relief which had permitted the use of masks. Both sides have now moved for summary judgment on their respective claims and agree that there are no material issues of fact to prevent the Court from deciding this issue on the papers submitted. For the following reasons, plaintiff's motion for summary judgment is GRANTED and defendants' motion is DENIED.

I. PROCEDURAL HISTORY

On September 24, 1999, the American Knights applied to the New York Police Department ("police department") for a parade permit and a sound device permit in conjunction with a planned event to be held on Saturday, October 23, 1999, on the steps of the New York County Courthouse at 60 Centre Street. After reviewing the application, however, the police department informed the American Knights on October 15, 1999, that its plan to wear masks, which it had communicated to the police department, would violate New York Penal Law § 240.35(4). The permit was therefore denied. In pertinent part, N.Y. Penal Law § 240.35(4) provides:

A person is guilty of loitering when he:

... Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a

masquerade party or like entertainment ...

As a result of the denial, the American Knights, on October 19, sought a preliminary injunction forcing the police department to allow the event and the masks. On October 21, after a hearing, which included testimony from both sides, this Court sitting with Judge Hellerstein, issued a preliminary injunction that allowed the American Knights to conduct the event with masks. However, on October 22, the Circuit stayed without comment that "part of the district court order permitting the use of masks." The plaintiff applied pursuant to 28 U.S.C. § 1651 to Justice Ginsberg to re-instate the preliminary injunction, but on October 23 she declined to do so.

The American Knights conducted the event on October 23 as planned. Seventeen members participated and wore the American Knights' regalia but did not wear masks. After the event, both parties moved for summary judgment[13] on the plaintiff's request for declaratory relief and a permanent injunction. The members of the American Knights plan to hold rallies in New York in the future and seek to wear its full regalia. See Plt. Mem. at 6.

II. BACKGROUND

The American Knights describes itself as an ideological organization that advocates white separatism and "white pride." The organization was founded by Jeffrey Berry ("Berry"), the National Imperial Wizard, approximately five years ago and claims to be an "unincorporated political membership association that advocates on behalf of the white race and the Christian faith." While not formally associated with the notorious Ku Klux Klan ("KKK"), the two groups share certain beliefs, including a belief in the separation of races. Among

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[13] Plaintiffs amended their complaint on January 13, 2000, to seek prospective declaratory and injunctive relief.

other things, the American Knights oppose affirmative action, racial intermarriage and immigration. The group's leaders opine that the organization does not advocate the use of force or violence to achieve its goals nor does it advocate the hatred of any racial group.

Regardless of what they may say the fact is that members of the American Knights don robes and hooded masks similar to, and traditionally associated, with the KKK, and consider these trappings integral to their identity. As one member stated,

Our traditional Klan regalia demonstrates our organization's traditional historical link with the original Ku Klux Klan. The hooded masks also convey a sense that everyone is equal, regardless of social rank, economic status, gender or race. The robes and hood with the mask is [sic] also intended as a religious symbol. Specifically, the hood reflects their belief that they are all sinners in the eyes of God and must therefore hide ourselves before God.

Clearly, racial hatred is the image conjured up by the regalia. The American Knights, however, claim that the masks provide anonymity at public events, leafleting and at other public activities. The organization believes that due to the unpopularity of its views, "being able to preserve the anonymity of our members is important if the organization is to attract and keep members." Berry Aff. at 2. It is for this reason too that the group does not publicize the names of its members, except for those persons in leadership positions. In fact, the organization's concerns appear to be well-founded as members of the American Knights claim that they have been subject to public harassment, threats, and violence.

Individual members have submitted affidavits to the Court attesting to how they suffered repercussions during and after their participation in various American Knights' rallies. Specifically, members have been followed after rallies by

counter-demonstrators who have attempted to ascertain the members' identities and have subjected them to verbal abuse and even physical injury. Berry stated that a number of the members, including his former wife and his son, had been injured by the conduct of counter-demonstrators either during or immediately after participation in an event.[14] The fear of identification is further illustrated by a testimonial from one of the unnamed plaintiffs in this action who described how, at an event in Ohio in 1998, her mask became separated from her hood, revealing her face. The media photographed her and the photos were widely disseminated. As a result of the publicity, her co-workers and employer learned of her affiliation with the American Knights, and she consequently lost her job. She endured threatening phone calls and hate letters, the windows in her home were broken, her car was vandalized and her children harassed. The same member reports that after her participation in the October 23 event, her children were further taunted and harassed, (she asserts that she took part in the October 23 event only as a matter of principle to challenge the anti-mask law). Because of this negative exposure, she continues to fear retaliation.

Other members also experienced harassment and repercussions after the October 23 event. A number of the counter-demonstrators attending the event threw batteries, rocks and other projectiles at the participants and verbally threatened the members with death or injury. Two counter-protestors evaded the alleged "tight" police security and physically assaulted the

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[14] At the hearing before this Court on October 21, 1999, Berry testified to the retaliation that his family had experienced as a result of his public exposure as the leader of the American Knights:

I've had my house bombed about 14 times ... I've had my house burnt down with a Molotov cocktail. My daughter has been shot at. I have been beaten. My family is constantly harassed, threatening phone calls over the phone, you know, saying they're going to kill us because we are members of the Ku Klux Klan. 10/21/01 Trans. at 43.

Grand Dragon for the Realm of New York and New Jersey. They shattered his eyeglasses causing him serious injury. Moreover, participation in the event and ipso facto identification resulted in one person losing her job, another being harassed extensively at his job site, and the family of another member being verbally and physically abused. Some of the participants indicated that, as a result of such reprisals, they will not rally again unless they are permitted to wear masks. Still others, as a consequence of the stay, decided not to participate at all.

Further, the American Knights is systematically monitored by Klanwatch, a project of the Southern Poverty Law Center; the Anti-Defamation League; the Jewish Defense Organization; and the Right-Wing Watch project of People for the American Way. While this monitoring takes many forms, identification is pivotal. For example, as a part of the Jewish Defense Organization's "Operation Klan Kicker," the Grand Dragon for the Realm of New York and New Jersey's name, address and phone number were listed on its website for several weeks after the October 23 event. Visitors to the Jewish Defense Organization's website were encouraged to "drive [him] out of the state." Suffice it to say that membership alone in the American Knights spawns retaliation and stifles free expression. It is against this backdrop that I consider the American Knights' request for a permanent injunction.

III. DISCUSSION

Plaintiff contends that N.Y. Penal Law § 240.35(4) constitutes an unconstitutional infringement on its members' right to free speech on several related grounds including: 1) that the statute violates their right to anonymous speech and association; 2) that the statute violates the right to symbolic speech; 3) that the statute is facially unconstitutional as it excepts conduct occurring in "connection with a masquerade party or like entertainment;" and 4) that the city has engaged in viewpoint

discrimination by selectively enforcing the statute. I will discuss each argument in turn.

I. Standard of Review

The standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the moving party must show actual success on the merits. See Amoco Production Co. v. Village of Gambell, AK., 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (citing University of Texas v. Camenisch, 451 U.S. 390, 392, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)). Therefore, on summary judgment, the standard is the same as for any summary judgment motion, namely the court may not grant a permanent injunction unless it determines that there is no genuine issue of material fact to be tried. Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has the burden of demonstrating the absence of any genuine issue of material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Furthermore, the court must "draw all factual inferences in favor of the party against whom summary judgment is sought." Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202 (2d Cir.1995).

II. Wearing Masks is Protected by the Right to Anonymous Speech

Plaintiff asserts that § 240.35(4) violates its right to anonymous speech under the First Amendment by preventing its members from concealing their identities while engaged in a political demonstration.

No one disputes the fact that plaintiff is a notorious racist organization, at least not this Court. The focus here, however, is on the constitutional protections, spelled out in the Federalist papers by our founding fathers, and on whether the conduct here

and of concerns to the police should be protected. This is not to say that there are no situations when the security of the community prevails over the right to protest. Historically, the right to free speech has been zealously guarded in America, and we need only look to the great jurists of the twentieth century to understand the depth of that guardianship and how zealously it must be protected in a democracy. "The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion." Learned Hand, The Spirit of Liberty: Papers and Addresses of Learned Hand 284 (Irving Dillard ed., 3d ed.1960). In our democracy, it has always been that "uninhibited, robust and wide open" debate has long been recognized as the lifeblood of our political system and our society as a whole. *211New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Further, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

This Court has long recognized the right to express one's views anonymously.

Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre v. Ohio Elections Commission, 514 U.S. 334, 357, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (citations omitted); see also Talley v. California, 362 U.S. 60, 64, 80 S.Ct. 536, 4

L.Ed.2d 559 (1960) ("Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."); NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

In NAACP v. Alabama, 357 U.S. at 466, 78 S.Ct. 1163, the Supreme Court held that the state of Alabama could not compel the NAACP to reveal to the State's Attorney General lists of its members' names and addresses when to do so would risk impeding the growth of that organization. There, the NAACP argued that it should not be required to comply with the state law because "the effect of compelled disclosure of the membership lists [would] be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs." Id. at 460, 78 S.Ct. 1163. In response, the government contended that the application of the law was constitutional both because the state had a legitimate interest in using the lists to determine whether the NAACP was conducting intrastate business in violation of the Alabama foreign corporations act and because any effect on the NAACP's membership was indirect. The Court applied a high level of scrutiny, stating that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." Id. at 460-61, 78 S.Ct. 1163.[15] Under this standard,

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[15] Although it is difficult to generalize about the levels of scrutiny applied by the Court, the following basic guideline may be helpful. In the context of First Amendment challenges, the lowest level of scrutiny, rational basis, which asks whether the law in question serves a legitimate government interest that is rationally related to the stated purpose, is not appropriate. Rather, courts apply either an intermediate level of scrutiny, such as in the case of commercial speech, which asks whether the government has a substantial interest that is directly advanced by the law. See Florida Bar v. Went For It, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). Or, more often, as in the case of political speech and artistic expression, courts apply what is called strict or exacting scrutiny, the highest level of scrutiny. Under this standard, the court must ask whether the government has a compelling interest in the law that is narrowly tailored to fit its purpose. See

the Court rejected both of defendant's arguments. First, the *Court held that the fact that the statute's impact was indirect did* not remove it from constitutional scrutiny.

The fact that Alabama ... has taken no direct action to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.

Id. at 461, 78 S.Ct. 1163. Second, the Court observed that to reveal the identities of NAACP members would expose them to the risk of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," id. at 462, 78 S.Ct. 1163, and concluded that the law affected "adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining ..." Id. at 462-63, 78 S.Ct. 1163. The Court held that the state had "fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." Id. at 466, 78 S.Ct. 1163.

In a similar case, Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Court held that a federal regulation that required the disclosure of donors to political parties was unconstitutional in certain instances. In Buckley, the plaintiffs argued that compelling certain controversial political parties to make public the names of their donors would result in a decrease in contributions as the individual donors, once identified, risked reprisal for their contributions. Affirming the

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NAACP, 357 U.S. at 460, 78 S.Ct. 1163.

right to anonymous expression, the Court stated that "we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Id. at 64, 96 S.Ct. 612. The Court then applied "exacting scrutiny," and concluded that the plaintiffs had shown "a reasonable probability that [in some cases] the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." Id. at 74, 96 S.Ct. 612.

Based on this finding, the Court agreed that the plaintiffs' interest in protecting the anonymity of their donors outweighed the government's legitimate interest in monitoring election activities.

Finally, in McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), the Court held that an Ohio statute that prohibited the distribution of anonymous campaign literature was unconstitutional. In McIntyre, a citizen was fined by the Ohio Elections Commission for distributing leaflets to persons attending a public meeting in Westerville, Ohio, with respect to an imminent referendum on a proposed school tax levy. The citizen challenged the fine on the ground that it constituted an unconstitutional infringement on her right to free speech, but the state argued that the statute constituted a reasonable regulation of the electoral process. As the statute at issue burdened "core political speech," the Court applied "exacting scrutiny" under which the statute would be upheld only if it were found to be narrowly tailored to serve an overriding state interest. Id. at 348, 115 S.Ct. 1511. In its analysis, the Court first noted that the plaintiff's desire for anonymity may have been motivated by any number of legitimate concerns including "fear of economic or official retaliation, ... concern about social ostracism, or merely ... a desire to preserve as much of one's privacy as possible." Id. at 341-42, 115 S.Ct. 1511. The Court then acknowledged that the state had a legitimate interest in

insuring the reliability of its election information but concluded that in this case, this interest did *not outweigh the plaintiff's* interest in expressing her political views, particularly since the state's concern could have been addressed by a more narrowly tailored law. Id. at 348-49, 115 S.Ct. 1511.

Here, the concerns of the American Knights are on point with those confronted by the plaintiffs in the above cases. Like the NAACP members, the citizen distributing leaflets and the donors to political campaigns, the American Knights have produced unrefuted evidence that it has a legitimate fear of reprisal if its members reveal their identities at public American Knights' events. Members who have taken part in demonstrations without their masks, including those at the October 23 rally, describe the reprisals as pervasive and as having serious consequences in their lives including loss of employment, physical injury and threats to their children's safety. These concerns are only bolstered by the fact that a number of anti-Klan groups make it their business to monitor the activities of the American Knights, which includes various efforts to identify its members and force them out of their jobs and their communities. Furthermore, the proliferation of computers and the world wide web provides the opportunity to post photographs of and personal information about participants and to do it instantaneously at zero or little cost.

The question then is do the facts and the law provide First Amendment protection for the plaintiff. Defendants argue that they do not. In all the cases cited, the defendants contend, there were attempts to compel disclosure-- the members' names, the list of donors or the identity of the leaflet publisher--while here, the government seeks merely to prevent a demonstrator from concealing his or her identity. The distinction is misplaced. Protection does not hinge on whether the requirement "compels disclosure" or "prevents concealment," rather it is whether disclosing the identity of the American Knights' members restricts protected speech, and, if so, whether the statute is

narrowly tailored to serve a compelling state interest.

When then is the test met and a statute "narrowly tailored to serve an overriding state interest"? McIntyre, 514 U.S. at 348, 115 S.Ct. 1511 ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."). The gravamen of the First Amendment protects speech we embrace as well as speech we abhor, a principle that requires constant vigilance by each branch of government. In the words of Justice Holmes, written in dissent in United States v. Schwimmer, 279 U.S. 644, 654- 55, 49 S.Ct. 448, 73 L.Ed. 889 (1929): "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought we hate."[16] Indeed, "[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." Home Bldg. & Assoc. v. Blaisdell, 290 U.S. 398, 483, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

In defense of the statute, defendants rely on security and law enforcement concerns. The statute prevents groups of demonstrators from concealing their faces which understandably makes it more difficult for police officers to identify and apprehend wrongdoers. While these concerns were not a factor on October 23 (as no one has alleged that the American Knights' members engaged in any illegal conduct), one could argue that a police officer's job is made easier if he or she is able to see the face of the person who commits an illegal act, particularly if that person attempts to evade arrest. It is also true that if counter demonstrators cause security concerns or are

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[16] The dissent by Justice Holmes became the law when Schwimmer was overruled by Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084 (1946). See Parker v. Levy, 417 U.S. 733, 772 n. 6, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

believed likely to do so this too must be balanced as in so many aspects of the law against the right to protected speech. Let's look at the relevant considerations. First, is the statute narrowly tailored?[17] The statute paints with a broad brush, prohibiting all demonstrators, peaceful and unlawful alike. No evidence was submitted supporting the argument that the police department had any reason to believe that the members of the American Knights would engage in unlawful behavior on October 23, and, in fact, they did not.[18] Yet the statute applies regardless of the propensity of the group for illegal behavior.[19] This blunderbuss approach, which encompasses so many lawful demonstrators, cannot be considered "narrowly tailored." See McIntyre, 514 U.S. at 350-51, 115 S.Ct. 1511 ("Although these ancillary

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[17] The statute, Penal Law Section 240.35(4), provides in pertinent part:

A person is guilty of loitering when he:

... Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment ...

[18] In fact, it was the counter-demonstrators who posed the threat of violence. However, it is well-established that the possibility of provoking a response from onlookers is rarely if ever a justification for quelling speech. See Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

[19] "Anti-mask laws that explicitly permit only certain expressive mask-wearing unnecessarily ban First Amendment exercise, as individuals engaged in political expression do not generally pose the danger that individuals intending to commit crimes do. Therefore, such laws fail the narrowly tailored requirement. Similarly, because individuals who require anonymity in order to speak for lawful reasons do not present the crime risk of those individuals who desire anonymity for unlawful reasons, narrow anti-mask laws overly restrict free speech and also fail the narrowly tailored requirement." Stephen J. Simoni, Note, Who Goes There?-- Proposing a Model Anti-Mask Act, 61 Fordham L.Rev. 241, 256 (1992).

benefits [of the statute] are assuredly legitimate, we are not persuaded that they justify [the statute's] extremely broad prohibition."); American Knights of the Ku Klux Klan v. City of Goshen, 50 F.Supp.2d 835, 842 (N.D.Ind.1999) ("While preventing violence and identifying and apprehending criminals are compelling government interests, the record does not support a connection between the ordinance and Goshen's asserted interests and the ordinance is not narrowly tailored to achieve Goshen's stated goals.").[20] The failure of the statute to comply with this narrowly tailored concept is accentuated by the fact that the government could have taken other less restrictive measures to address its goals. For example, the police department could ask permit applicants if participants will wear masks and if so, require lead time to insure proper security measures are in place and assign additional officers to curtail any increased risk of disruption by demonstrators or, as happened here, counter-demonstrators.

Second, is there a compelling state interest? While a state has a substantial interest in maintaining law and order, the statute, to pass constitutional muster, must be applicable to the proscribed conduct. Here, the broad exception in the statute excepts masks "in connection with a masquerade party or like entertainment ..." and, therefore, allows everything from masked "trick or treaters" in Queens to the masked participants in the annual Gay Pride parade on Fifth Avenue. Defendants do not suggest that one masked event is less likely to lead to criminal behavior than another since illegal activity can occur anywhere people gather and the statute makes no distinctions. Surely, if masked events posed such a significant problem for the police department, the

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[20] The statute at issue in American Knights of the Ku Klux Klan v. Goshen was similar to the one here, but it differed in that it prohibited individuals from wearing masks for the "purpose of disguising or concealing his or her identity" in a "public place." Thus, unlike the statute here, it considered the intent of the wearer and addressed mask-clad individuals rather than groups. See 50 F.Supp. at 836.

exception would not have found its way into the statute. In fact, the determination of whether any particular event presents a risk of disruption must be made on an individualized, case-by-case basis in which the police consider the various factors. See Chicago v. Mosley, 408 U.S. 92, 100-01, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) ("predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications"). Here, the police could have adequately prepared for the event, it had ample notice and the event was held on a Saturday, next door to police headquarters.

In short, if there is a state interest, it fails to satisfy the standard required to justify an infringement on political speech. Thus, while the defendants are, of course, mandated to enforce laws punishing disorderly and criminal behavior directly, the First Amendment vitiates the jurisdiction of the anti-mask statute as a means of doing so indirectly. See McIntyre, 514 U.S. at 357, 115 S.Ct. 1511.

III. Wearing Masks is Protected by the Right to Symbolic Speech

Plaintiff contends that the statute is unconstitutional as a violation of its First Amendment protection of symbolic speech. Specifically, the plaintiff contends that the wearing of the hooded mask constitutes symbolic speech that is protected under the First Amendment.

It is well-established that certain "non-speech" conduct can constitute protected, symbolic speech. See Tinker v. Des Moines Community Sch. Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (holding that a student had the right to wear a black arm band to school to protest the Vietnam War). While it is true that just because a person intends to express an idea through conduct does not mean that the conduct is necessarily protected, see United States v. O'Brien, 391 U.S. 367, 376, 88

S.Ct. 1673, 20 L.Ed.2d 672 (1968), "conduct" may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

The Court in Texas v. Johnson set forth the standard that applies here. In that case, the Court held that the plaintiff's act of burning the American flag in protest was protected under the First Amendment as expressive conduct, despite the state's interests in preserving the peace or preserving the flag as a symbol of national unity. The Court began its analysis by considering whether the plaintiff's conduct constituted "expressive conduct." To make this determination, the Court held that it must find that "[a]n intent to convey a particularized message was present, and [that] the likelihood was great that the message would be understood by those who viewed it." Johnson, 491 U.S. at 404, 109 S.Ct. 2533. After concluding that the plaintiff satisfied this element, the Court continued to consider "whether the State's regulation is related to the suppression of free expression." Id. at 403, 109 S.Ct. 2533. In other words, whether the legislature intended to dampen speech when it crafted the statute. The Court noted that if it found that there was no intent to suppress a particular form of speech, then it must apply the less stringent standard set forth in O'Brien to determine whether the statute survived.[21] If, on the other hand,

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[21] The Court in O'Brien established the test for determining whether a government regulation should survive a claim that it infringes on the right to symbolic speech when the regulation is not alleged to have been enacted for the purpose of quelling speech. There, the Court considered the constitutionality of a statute that made it illegal to destroy or otherwise mutilate a selective service registration card, or draft card. The plaintiff had been arrested for burning his draft card and challenged the conviction on the ground that the statute was an unconstitutional infringement on his right to freedom of expression. However, the Court rejected his challenge, after applying the following test:

it found that the suppression of speech was the purpose, then it must apply a more demanding standard. Id. at 403, 109 S.Ct. 2533. In that case, the Court found that the O'Brien test was inapplicable as the statute was intended to limit speech, and, therefore, it applied strict scrutiny and found that the statute did not pass constitutional muster.

Applying this test here, clearly the masks constitute expressive conduct. The regalia of the American Knights is readily identifiable and is intended to and does convey a message that most people are likely to understand. See e.g., Id. at 404, 109 S.Ct. 2533. The hooded masks are an integral part of the message that links the American Knights to the KKK and its horrific ideology. The defendants attempt to defuse the message of the hooded masks by separating out the masks from the rest of the regalia and arguing that the masks themselves do not convey a particularized message. This argument runs counter to prevailing precedent. In Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), we read, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." Id. (citing examples of expressive conduct including saluting the flag--and refusing to do so--wearing an armband, displaying a red flag, and even marching, walking or parading in uniforms displaying the swastika) (citations omitted). Undoubtably the masks with the hoods,

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[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Id. at 377, 88 S.Ct. 1673.

taken together, deliver the message that the American Knights intends to convey.

Having found that wearing the masks does constitute "expression" under the First Amendment, let us consider whether the statute was intended to suppress or popularize any particular viewpoint. This issue is relatively simple as neither side contends that this statute was enacted with an illicit motive.[22] Thus, the O'Brien test is in order. See United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The test has four components:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377, 88 S.Ct. 1673.

I have already concluded that the statute fails prong two--the important or substantial government interest--and prong four--narrowly tailored.[23] See infra section II (describing in more

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[22] The statute was enacted in 1965 but its substance can be traced back to legislation originally enacted in 1845 as a part of the Anti-Rent Riot act. That Act was enacted specifically to thwart armed insurrections by Hudson Valley farmers who used disguises to attack law enforcement officers. See Haroules Aff. Ex. K., Messages from the Governors of the State of New York Comprising Executive Communications to the Legislature and Other Papers Relating to Legislation from the Organization of the First Colonial Assembly in 1683 to and Including the Year 1906, Vol. IV, 1843- 1856, pp. 139-150.

[23] O'Brien is further distinguishable from our facts, as the Court noted there that its holding did "not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression ... in practice has the effect of entirely preventing a speaker from reaching a

detail). As the statute does not survive even the less stringent *O'Brien test, I find that it violates the right of plaintiff's* members to express themselves through symbolic speech.[24]

IV. Penal Law § 240.35(4) is Facially Unconstitutional

Plaintiff further contends that §240.35(4) is facially unconstitutional as it impermissibly distinguishes on its face between gatherings "in connection with a masquerade party or like entertainment" and all other types of gatherings.

A government entity undoubtedly has the right to place reasonable time, place, or manner restrictions on speech in order to achieve legitimate objectives. See Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, (1989) (noise regulation); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (anti-noise provision); Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (licensing requirement for parades). However, "a constitutionally permissible time, place or manner restriction may not be based upon either the content or subject matter of speech." Con. Edison Co. of New York v. Public Serv. Comm. of New York, 447 U.S. 530, 536, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

In Con. Edison, the plaintiff sued the Public Services Commission of New York on the ground that the Commission's

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significant audience with whom he could not otherwise lawfully communicate." See O'Brien, 391 U.S. at 389, 88 S.Ct. 1673 (Harlan, concurring).

[24] The police department's denial of a permit on the grounds that a proposed event would violate the anti-mask statute may also constitute a prior restraint on speech. See Bantam Books v. Sullivan, 372 U.S. 58, 70-71, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). This lends even further support to the application of a higher standard of review in scrutinizing the statute, a test it undoubtably fails. See Collin v. Smith, 578 F.2d 1197, 1209 (7th Cir.1978).

regulation prohibiting "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power" violated its First Amendment rights. The Commission argued that the regulation allowed the consumer access to "useful" information and only halted the dissemination of controversial political information. The Commission also emphasized that the ban did not favor any particular political viewpoint.

The Court explained the distinction between a content-neutral restriction on speech and a content-based one and the different levels of scrutiny for each. With regards to a content-neutral restriction on speech, the Court wrote, "A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable." Thus the Court indicated that a low level of scrutiny was appropriate. However, with regards to the content-based speech, the Court explained that a higher level of scrutiny was required. "[W]hen [the] regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not become prohibited 'merely because public officials disapprove the speaker's views.' " Id. at 536, 100 S.Ct. 2326 (citation omitted). The Court continued to emphasize that, "[a]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " Id. at 537, 100 S.Ct. 2326 (citation omitted). Applying this criteria, the Court found the regulation unconstitutional, observing that "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." Id. at 538, 100 S.Ct. 2326.

Defendants argue that Con Edison is inapposite here, because in that case the ban expressly forbid controversial, political topics, while here, the language of the statute does not mention political speech. In a similar vein, defendants suggest that evidence of a legislative intent to inhibit a particular type of

speech is a prerequisite to finding a First Amendment violation and point out that here there is no evidence of such an intention. In support of their claim, defendants cite Turner Broadcasting System, Inc. v. FCC, in which the Court stated that the "primary inquiry" in determining whether a statute is content-neutral is whether there is evidence of an illicit legislative purpose. See Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Defendants, however, neglect to recognize the caveat that immediately follows: "But while content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases." Id. Here, illicit legislative intent is not a necessary ingredient to a violation of the First Amendment. Like the regulation in Con Edison (and unlike the statute in Turner), N.Y. Penal Law § 240.35(4) distinguishes on its face between types of expression--it allows masks for entertainment events but for no others. The result is that a face mask worn to delight the public is lawful while one intended to sway its political beliefs is unlawful. The legislature's intent may or may not reflect a yen to be entertained and to inhibit political speech (hard as this is to believe), but the lack of an illicit intent does not negate the clear preference for one type of speech over others.[25]

Defendants' argument that the statute's omission of the words "political" or "controversial" speech somehow exempts it from First Amendment scrutiny is similarly unconvincing.

As this statute is clearly founded on the content of the speech, it cannot be sustained as a time, place or manner restriction. See Con. Edison, 447 U.S. at 537, 100 S.Ct. 2326 (holding that as

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[25] See generally Tunick v. Safir, 209 F.3d 67, 84 (2d Cir.2000) (stating that "grave questions would ... arise as to the rationality of a law that singled out for prohibition one form of nude expression that is concededly covered by the First Amendment, while permitting, with mighty little explanation, many other equally nude demonstrations").

the regulation was indisputably based on the content of the bill inserts, that it could not be found to be a constitutional time, place or manner restriction).

V. Selective Enforcement of the Statute

Finally, plaintiff challenges the statute on the ground that the defendants have engaged in viewpoint discrimination by allowing certain groups to take part in masked demonstrations whose message it favors.

"Viewpoint discrimination is ... an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." See Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

In support of its claim, plaintiff cites several high-profile non-entertainment gatherings in which the police department allowed the participants to cover their faces by wearing a mask or the equivalent. These include Iranian students protesting the Shah in 1977, protesters rallying after the funeral of Amadou Diallo in 1999, protesters opposing the rally held by the plaintiff in this action on October 23, 1999 who wore rubber face masks satirizing Mayor Giuliani, and pro-Palestinian protestors who wore kefiyahs or head scarves on October 13, 2000 when they gathered at Times Square and again on October 20, 2000 when they assembled at the Israeli Consulate.

In response, defendants argue that allowing these groups to gather does not amount to selective enforcement because in those cases the participants did not provide advance warning of their intent to demonstrate and wear masks, and that the police department used its discretion to determine that Penal Law § 240.35(4) should not be enforced. It stretches credulity to understand how the fact that the police department was not

given advance warning of a group's intention to wear masks prevented enforcement of the law while with advance warning, a proper parade permit application, and the time for the police to prepare an application may and will be rejected. As the defendants have offered no reasonable explanation of this somewhat skewed interpretation of the statute, it seems indisputable that the city has engaged in viewpoint discrimination by selectively applying the statute to the American Knights while not to other similarly situated groups.

In finding Penal Law § 240.35 unconstitutional, a decision that effectively permits the American Knights to wear masks, I am mindful of the delicate climate that pervades the city and the rest of the country today. Recent events have brought us to an elemental crossroads where civil liberties are embattled against our concerns for national security. While clearly a commitment to constitutional principles must not be a "suicide pact,"[25] the

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[26] This concern was eloquently expressed by Justice Arthur Goldberg, writing for this Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), who commented that "while the Constitution protects against invasions of individual rights, it is not a suicide pact." In writing, Justice Goldberg echoed a similar concern earlier formulated by Justice Robert H. Jackson dissenting in Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949): This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Terminiello, 337 U.S. at 37, 69 S.Ct. 894 (J. Jackson, dissenting).

The struggle to establish civil liberties against the backdrop of these security threats, while difficult, promises to build bulwarks of liberty that can endure the fears and frenzy of sudden danger--bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile.... For in this crucible of danger lies the

rational and measured exercise of jurisprudence must be zealously sustained even in time of war, including the war on terrorism. The conflict between civil liberties and security in times of national crises is nothing new, and at times have resulted in moments not our proudest, including the Alien and Sedition Acts of 1798, President Lincoln's suspension of habeas corpus, the Espionage Act prosecutions of anti-war statements during World War I, the internment of American citizens of Japanese descent during World War II, and the Cold War Communist scare of the McCarthy era. This concept was eloquently underscored by Justice Brennan some 15 years ago in these words:

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is GRANTED and defendants' motion is DENIED. The Clerk of Court is instructed to close this case and remove it from my docket.

SO ORDERED.

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opportunity to forge a worldwide jurisprudence of civil liberties that can withstand the turbulences of war and crisis. In this way, adversity may yet be the handmaiden of liberty.

William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, Speech at the Law School of Hebrew University, Jerusalem, Israel (Dec. 22, 1987) (as published by the Brennan Center for Justice at NYU School of Law).

First Amendment to the Federal Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

New York Penal Law § 240.35(4)

A person is guilty of loitering when he:

* * *

4. Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities ...